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IN THE

Supreme Court of the United States

October Term, 1954

Docket No. 54

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

EMANUEL REDFIELD
Counsel for Petitioner
60 Wall Street
New York City 5

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Opinions Below

No opinions were written below other than a memorandum of the Appellate Division upon affirmance which is reported in 282 App. Div. 775 and is set forth in Appendix "A" hereto.

Matters Related to Jurisdiction

(a) Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. 1257 (3).

(b) Timeliness

The judgment of the Court of Appeals,—the highest court in the State in which a decision could be had was filed on January 22, 1954. The amended Remittitur of the Court of Appeals was entered on March 12, 1954. Application for Writ of Certiorari was filed on April 25, 1954, and the Writ was granted on June 10, 1954.

(c) How Constitutional Questions Raised

Petitioner at his appearance before the grand jury which culminated in his subsequent prosecution raised the constitutional objections embraced here (R. p. 122, f. 366). Subsequently, at the opening of the trial a motion was made to dismiss the indictment and the constitutional claims were made (R. p. 57, f. 171). At the end of the prosecution's case (R. p. 147, f. 439), the motion was renewed. By exceptions to the trial court's charge to the jury the constitutional objections were again raised (R. p. 209, f. 626). The Court of Appeals amended its remittitur to indicate that the Federal questions were raised (R. p. 234).

Constitutional Provisions and Statutes Involved

"Constitution of the United States of America, Article XIV, Section 1:

'* * *. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *.'

Constitution of the State of New York, Article 1, Section 6:

'* * * nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant questions concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general.'

Charter of the City of New York, Section 903:

'If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any country included within its territorial limits, or regarding the nominations, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.'

Code of Criminal Procedure, Section 10:

'No person to be a witness against himself in a criminal action or to be unnecessarily restrained.

'No person can be compelled in a criminal action to be a witness against himself, * * * '

Penal Law, Section 381:

'Offender a competent witness; witnesses' privileges 'A person who has violated any section of this chapter relating to bribery or any section of this article or who has committed an attempt to violate any such section is a competent witness against another person so offending. No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court, magistrate or referee, or before any joint legislative committee, upon any investigation, proceeding or trial, for or relating to or concerned with a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter of thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him, upon any criminal investigation, proceeding or trial.'

(To the same effect, see also Penal Law Section 584 (Conspiracy) and Section 996 (Gambling).)

'5. Contumacious and unlawful refusal to be sworn as a witness; or after, being sworn, to answer any legal and proper interrogatory * * * '.

Judiciary Law, Section 751:

'Punishment for criminal contempts

'Punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court * * * '

Penal Law, Section 600:

'Criminal contempt

'A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor: * * *

'6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory; * * * ' "

A judgment of the County Court, County of Kings, State of New York, was rendered on April 9, 1953, convicting the petitioner of the crime of Criminal Contempt of Court (New York Judiciary Law, Section 750, subdiv. A, 5; New York Code of Criminal Procedure, Section 619; New York Penal Law, Section 600, subdiv. 6), after a trial by Leibowitz, County Judge, and a special jury (R. 214, f. 640). Petitioner was sentenced to one year in the New York City Penitentiary (R. 219, f. 656). The Appellate Division of the Supreme Court of the State of New York affirmed the conviction without opinion (R. 230, ff. 688-90), but with a brief memorandum reported in 282 App. Div. 755. Leave to appeal and admission of petitioner to bail was granted by a judge of the Court of Appeals (R. 277, ff. 679-81). The Court of Appeals affirmed his conviction. Stay of execution pending disposition of this petition for certiorari was granted by a judge of the Court of Appeals.

Questions Presented

1. Does compulsion to testify under threat of imprisonment for one year after a waiver of immunity was obtained by duress constitute a denial of due process under the Fourteenth Amendment to the Constitution of the United States?

2. Did the execution of a waiver of immunity by the petitioner under the circumstances of the facts of this case effectively waive his rights to be silent under the Federal Constitution?

3. Was the execution of the waiver of immunity by the petitioner surrounded by such circumstances as to constitute a denial of due process of law?

4. Was the threat to petitioner of a loss of his employment under Section 903 of the Charter of the City of New York for a refusal to sign the waiver of immunity a denial of due process of law if such waiver was obtained by reason of that law?

5. Was the judgment of conviction of the petitioner for criminal contempt of court and his sentence of imprisonment for one year a denial of due process of law, considering all the circumstances that embrace his conviction?

Statement of the Case

Petitioner served as a patrolman in the police department of the City of New York from August 7, 1942 until his resignation on March 27, 1951 (R. 77-79, ff. 225-30). On March 7, 1951, he was subpoenaed to testify before the grand jury of the County of Kings. Petitioner went to an

anteroom, "10 x 10, or 12 x 12" in size (R. 157, f. 470), with a desk in the room of "about 60 x 2" (R. 157, f. 471), with a bench, with about 35 people present (R. 158, f. 474), to which group an assistant district attorney made a single speech (R. 160, f. 480) and from all of whom he obtained en masse waivers of immunity within a space of twenty-five minutes (R. 165, f. 494).

The examination of petitioner was adjourned and he resigned from the police force to enter private business on March 27, 1951. On December 22, 1952, almost twenty-two months after signing of the waiver of immunity, petitioner was arrested and made to re-appear as a witness before the grand jury. At that time, an assistant district attorney put these questions to petitioner:

> "Q. While you were a plainclothesman in the Police Department of the City of New York did you ever accept or receive any bribes from bookmakers or other gamblers?
>
> "Q. I now ask you, Mr. Regan, while you were a plainclothesman in the Police Department of the City of New York did you receive any bribes from bookmakers?" (R. 9, ff. 26-7)

Petitioner stated in reply:

> "I claim my Constitutional and Statutory privileges and immunities. It is claimed that I signed a waiver of immunity before this body sometime in March of 1951.
>
> "I claim that I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not represented by counsel and I was not advised by anyone that I did not have to sign the same nor at the time of the execution of this waiver

> was I explained my Constitutional rights of the meaning of the waiver of immunity. I should like to add that since I signed the waiver of immunity I have resigned from the Police Department of the City of New York in March 1951 after having served nine years, two months and several days. So far as I know I have never been mentioned by anyone in connection with the present investigation either at the criminal trial or the Police Department Trial. Inasmuch as approximately one year and nine months have elapsed since the execution of my waiver of immunity and inasmuch as I claim my Constitutional rights were not properly safeguarded or explained to me, there is doubt and uncertainty concerning my status as a witness and my privileges and duties as such." (R. 122-23, ff. 366-68).

On January 5, 1953, County Judge Leibowitz directed petitioner to answer the questions under an "effective waiver of immunity" (R. 127, f. 381). Upon petitioner's reiteration of his constitutional privilege, an indictment was returned by the same grand jury, which indictment accused petitioner of "knowingly, wilfully and corruptly" committing the crime of Criminal Contempt of Court against the form of the statute in such case made and provided" (R. 10, f. 30).

In summation, at trial of the petitioner, the assistant district attorney thus characterized petitioner's predicament before the grand jury:

> "This is the position this man was in: If he answered the truth, if it was truth, 'Yes, I took bribes from a bookmaker,' having signed this waiver of immunity, he could be prosecuted for perjury—both bribery, accepting bribes from bookmakers, and per-

jury, which are very serious felonies. The crime for which he stands indicted here is a misdemeanor. So he was confronted with this alternative: (1) If he answers 'Yes, I took a bribe,' he is going to be prosecuted for bribery. (2) If he says, 'No,' and it is not the truth, he is going to be prosecuted for perjury. If he said 'No,' and it was the truth, then it was the simplest thing for him to say, 'No, I never took a bribe.' So what could he do? (3) He could not answer that question * * * " (R. 178-79, ff. 534-37).

POINT I

The waiver of immunity was compelled by Section 903 New York City Charter.

When the waiver of immunity was obtained from the petitioner, he was faced with the proverbial dilemma of jumping from the frying pan into the fire. This, of course, assumes that he knew what he was signing. If he did not sign, he would lose his job by virtue of Section 903 New York Charter. If he did sign, he was deprived of the protection granted against self-incrimination by Article 1, Section 6 of the New York Constitution. If he then answered "yes" to the question put to him, he was guilty of bribery. If he answered "no" and that was untruthful, he could be prosecuted for perjury.

Thus, the petitioner was placed in this predicament by reason of the effort by the respondent to prove his guilt by his own words. As shown, this procedure was based upon the compulsion of the statute.

The waiver was signed by virtue of the compulsion of Section 903 New York Charter. When Assistant District

Attorney Clarke testified the following transpired (R. 161, f. 482):

> "2. Now, at that time, Mr. Clarke, did you tell Mr. Regan that if he did not sign the waiver, that you would report that fact to the Police Commissioner? A. I certainly did."

This was followed by the Court's observation to the jury (f. 483):

> "The Court (To the jury): Gentlemen, the District Attorney had a perfect right to say that to him under the law. He would be required to report it to the Police Commissioner. When a policeman refuses to sign a waiver in a matter of this kind, he automatically forfeits his job as soon as the Police Commissioner hears about it. The District Attorney would, therefore, be in duty bound to notify the Police Commissioner that a policeman refused to sign a waiver.
>
> You may proceed.
>
> Mr. Hellenbrand: May I note my exception to that particular remark?
>
> The Court: Yes, you have an exception to the statement of the Court."

Therefore, at the time the waiver was obtained and when thirty-five men executed waivers, all in a space of twenty-five minutes (ff. 491, 492) all less than a minute per man, as an average, this petitioner had before him within that minute the alternative of signing or losing the job he had for about nine years. Since he was human, the easier choice was made in that minute of saving his employment.

Contrary to what was said in *McAuliff* v. *New Bedford*, 155 Mass. 216, 220, that petitioner has no constitutional

right to be a policeman, this Court has stated the right of employment to be a constitutional guarantee, and has so protected it. *Garner* v. *Los Angeles*, 341 U. S. 716 and *Wieman* v. *Updegraff*, 344 U. S. 183 are recent examples of such expressions.

The threat of losing employment is a species of duress akin to the other forms of duress familiar to this Court. The test is, what was the likelihood of the voluntariness of statement, absent the compulsion practiced? The *Adler* and *Wieman* cases are closely related because the compulsion of dismissal from employment was the sanction for failure to take a test oath.

Aside from all additional considerations of this case, petitioner submits that the force of Section 903 in subjugating petitioner's will so as to deprive it of voluntariness renders the obtaining of the waiver of immunity a denial of due process.

Consequently, when this led to his conviction for contempt through a chain of events to a refusal to testify under such waiver, then such conviction was a denial of due process.

POINT II

The waiver of immunity was signed under circumstances amounting to a denial of due process.

If this petitioner had not signed the waiver of immunity he would, in the absence of the provisions of Section 903 of the New York Charter have been entitled to the immunity conferred by New York Penal Law, Section 381 in instances where testimony is compelled in bribery cases.

If such immunity is removed through a waiver, then the witness has been deprived of the protection against self-incrimination found in the New York Constitution as well as of the protection of immunity statute Section 381 Penal Law.

It, therefore, follows that the procedure of obtaining a waiver of immunity is a more solemn event than what happened in this case, in that here thirty-five (35) waivers were obtained from thirty-five (35) witnesses in twenty-five (25) minutes (ff. 491, 492).

The circumstances that makes the exaction from petitioner of his repudiation of his constitutional rights and statutory as the price of testifying, so abhorrent to American concepts of justice are as follows: This is a quotation from the respondent's version in "Brief in Opposition to Petition for Writ of Certiorari" in this case, pages 11 and 12. It is based on the testimony of Assistant District Attorney Clarke, who was delegated to obtain the waiver. The facts are therefore deemed an admission by respondent of its version of the event. We quote:

> "Petitioner did not testify in his own behalf. He called as his sole witness Gerald V. Clarke an Assistant District Attorney who attended upon the execution of the waiver of immunity.
>
> The waiver of immunity was read by petitioner before he signed it (492). Mr. Clarke, stated that he was familiar with the procedure and practice of summoning witnesses before the Grand Jury (449). He was the individual who had requested petitioner to execute the waiver (449). The waiver was signed in an ante-room adjacent to the Grand Jury, in which were contained a desk and bench (470, 471). The

> room was crowded at one time and there might have been thirty-five or twenty-five men present when the waiver was signed (477). Mr. Clarke made a statement to all of these policemen while petitioner was in the room in a voice loud enough for all to hear (480, 490). He told petitioner that if the waiver was not signed, it would be reported to the Police Commissioner (482). He advised petitioner 'as to what this Grand Jury was concerned with' at or before he signed the waiver (485), and that 'if he is going to be put in the Grand Jury he must sign the waiver.' (488)
>
> Twenty-five minutes were consumed by the thirty-five men in executing their respective waivers, all in the immediate presence of Mr. Clarke, including petitioner (491, 492). The latter called everything on the waiver to petitioner's attention and explained it and petitioner read the waiver and told Mr. Clarke that he understood it (501, 502).
>
> On March 7, 1951, the treatment of petitioner in the anteroom was the same as was accorded to the other patrolmen who were executing waivers" (432).

During the event, petitioner had no counsel (f. 506).

It was after he had the benefit of counsel that he asserted his doubt as to the effectiveness of his waiver (R. 122, ff. 366-368).

Under these circumstances, admitted by the respondents, it can be concluded that the waiver was obtained by events that are a pattern of duress and lack of understanding. Too much emphasis cannot be placed on the procedure at the time whereby thirty-five (35) waivers were obtained in a mass gathering in the form of People's Exhibit 2 (f. 433) in twenty-five minutes or less than one a minute. What

understanding could there have been in a mob scene of such nature? What opportunity for thinking or deliberation was afforded to a mob of thirty-five being addressed on the subject of waivers in a small room by a person exercising the authority of a District Attorney? The answer is obvious.

Although the jury passed upon the question of the petitioner's understanding and voluntariness in assessing the waiver of immunity, nevertheless, its conclusion does not foreclose this Court's inquiry into the legal conclusions. Only recently, this Court had before it a case involving a confession obtained in a case tried not only in the same State, but also in the same Trial Court—*Leyra* v. *Denno*, 98 L. ed. Adv. p. 631. In that case, this Court inquired whether the confession was voluntary, even though the jury had inferentially found the confession "voluntary". Said this Court: "The question for our decision is therefore whether the present confessions were so coerced. This question can only be answered by reviewing the circumstances surrounding the confessions. We, therefore, examine the circumstances as shown by the undisputed facts of this case."

See, also, *Stroble* v. *Calif.*, 343 U. S. 181; *Stein* v. *New York*, 346 U. S. 156; *Watts* v. *Indiana*, 338 U. S. 49; *Haley* v. *Ohio*, 332 U. S. 596; *Malinski* v. *New York*, 324 U. S. 401; *Chambers* v. *Florida*, 309 U. S. 227; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Lisenba* v. *Calif.*, 314 U. S. 219.

POINT III

The doubt as to the effectiveness of the waiver should have excused the failure to answer.

The petitioner stands convicted because he had refused to answer, because among other things, the lapse of time between the execution of the waiver on March 7, 1951, and the call for his testimony on December 22, 1952, was of such a length of time as to create a doubt as to whether the waiver was still effective. He was not the only one in doubt, for the New York Court of Appeals in another case expressed doubt in *People ex rel. Hofsaes* v. *Warden,* of City Prison, 302 N. Y. 403, 406, whether a waiver operated in the future for even ten days. The doubt there was sufficient to warrant the excusing of the defendant from criminal contempt. In any event, there was a legitimate doubt in the mind of petitioner. His refusal to testify a year and a half after the execution of the waiver was substantial to him. Even the Trial Court realized the significance of such doubt when he charged the jury that if the waiver was not an effective one then the petitioner had a right to remain silent. The Trial Court charged the jury (f. 600):

> "If an effective waiver was signed by him, if he knew full well what he was doing when he went into that Grand Jury room in March of 1951, that waiver was good for all time thereafter." * * *
>
> "Of course, if you are not satisfied that the man knew what he was doing, if you are not satisfied that he knew the import of that waiver on March 7, 1951, he had a right to refuse on December 22, 1952, to give testimony which might incriminate him" (f. 602).

It is true that under Section 381, Penal Law he had to testify whether or not he had signed a waiver. But it was the dispute and doubt concerning the loss of petitioner's rights of immunity under the statute that brought about his silence. That silence has led to this judgment of conviction. Since there was a doubt and dispute concerning the effectiveness of the waiver it could not be said that the petitioner's actions were contumacious under Section 751, the Judiciary Law of New York. *People* v. *Hofsaes, supra.*

POINT IV

The alternatives presented to petitioner deprived him of his immunity against self-incrimination.

Although it was held in *Palko* v. *Connecticut,* 302 U. S. 319, that self-incrimination compelled by a State is not protected by the Federal Constitution, nevertheless, since that decision, and also prior thereto, it has been suggested that the privilege against such self-incrimination, is incorporated in the privileges and immunities clause and in the due process clauses of the Fourteenth Amendment. See, *Leyra* v. *Denno, supra,* Cf. *Irvine* v. *Calif.,* 98 L. ed. Adv. p. 324; *Wolf* v. *Colorado,* 338 U. S. 25; *Rochin* v. *Calif.,* 342 U. S. 165; *Adamson* v. *California,* 332 U. S. 46.

Since this case again presents the problem of self-incrimination to the Court, it is submitted that this is an occasion and opportunity for modifying the doctrine of the *Palko* case.

The self-incriminatory feature of this case hangs on the dilemma the petitioner found himself in of being required to testify or face this prosecution.

POINT V

The judgment of conviction should be reversed with directions that the indictment be dismissed.

Respectfully submitted,

EMANUEL REDFIELD
Counsel for Petitioner
60 Wall Street
New York City 5

APPENDIX A

Memorandum of Appellate Division, 282 App. Div. 775.

"People, &c., res. v. Regan, ap—Defendant appeals from a judgment of the County Court, Kings County, convicting him of criminal contempt of court, and from 'each and every intermediary order therein made.' It was defendant's contention upon the trial that a waiver of immunity executed by him, prior to his appearing before the grand jury, while he was a New York City police officer, was ineffective, as he had not understood the full nature and scope of his act and the district attorney had failed to advise him with respect to his rights. The question of whether defendant signed the waiver knowingly and fully aware of its import and consequences was submitted to the jury as a question of fact. Judgment unanimously affirmed. Assuming, without deciding, that the district attorney was under a duty to advise defendant of the nature and effect of the waiver of immunity and his rights with respect thereto, we are of the opinion that the proof established, beyond a reasonable doubt, that defendant had been so advised and had voluntarily and knowingly executed the waiver. Defendant's other contentions have been examined and are without merit. The minutes of the preliminary hearings, printed in the record, have not been considered in reaching this determination. No separate appeal lies from the intermediate orders, which have been reviewed on the appeal from the judgment of conviction (Code of Criminal Procedure, Sec. 517)."